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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RAMON BOJORQUEZ, Defendant and Appellant.	B159990 (Los Angeles County Super. Ct. No. BA223714)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marsha N. Revel, Judge. Affirmed.

William M. Duncan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Kyle S. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

Ramon Bojorquez appeals from the judgment entered following a jury trial in which he was convicted of two counts of felonious assault with the use of a firearm,

misdemeanor assault, possession of a firearm by a felon, possession of ammunition by a felon, and possession of a short-barreled shotgun. He contends that the trial court erred in (1) denying his request for discovery of police officers' personnel records, (2) instructing on adoptive admissions, (3) not instructing to view oral admissions with caution, and (4) failing to stay imposition of sentence for possession of a firearm by a felon. We affirm.

BACKGROUND

Between 2:00 and 2:20 a.m. on May 20, 2001, Juan Ramirez, Cesar Flores, and Freddie Saez were sitting in front of Ramirez's Los Angeles apartment drinking beer. Defendant approached the locked security gate in front of the apartment complex and asked to be let in. The men did not let defendant in because they did not know him. Defendant nonetheless climbed over the gate and came inside.

Once inside, defendant cursed at Ramirez and Flores for not having let him in. Flores first responded with words and he and defendant began to engage in a physical altercation. Ramirez separated them and went back to his apartment to get a another beer. Defendant and Flores resumed fighting. Defendant then began to walk away, but turned after a few steps, pulled a short-barreled shotgun from his waistband, and shot Flores. Flores fell to the ground, and defendant fired another shot at him. Ramirez returned with his beer after the shots had been fired.[1] Saez said to Ramirez that "'this guy,'" meaning defendant, "shot at [Flores]." Ramirez and Saez fought with defendant to keep him from leaving. Saez was able to grab defendant's gun and restrain him.

Police officers soon arrived in response to a 911 call. Ramirez went to meet the officers at the gate, saying, "'He's got a gun. He's got a gun.'" Officers entered and saw Saez holding defendant to the ground. Ramirez pointed to defendant, who was

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[1] The foregoing account of Ramirez's whereabouts is based on Ramirez's testimony at trial. A police officer who investigated the incident testified Ramirez told him that Ramirez saw defendant shoot Flores.

approximately five feet away, and said, "'That's the gun.'" "'He shot him.'" Defendant was taken into custody. He had a sock in his pocket that contained 21 shotgun shells. The shells matched two spent shells that were later found in defendant's shotgun.

Defendant did not present any evidence in his defense. He argued to the jury that he was not the shooter. (Flores testified that he had no knowledge of the incident and Saez did not testify at trial. The bulk of the evidence against defendant was presented by police officers who impeached Flores, Ramirez, and Saez.)

DISCUSSION

1. Discovery of Officers' Personnel Records

Prior to trial, defendant moved under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] for discovery of the personnel and administrative records of the police officers who had investigated this case. In an effort to demonstrate good cause, defendant noted that although Ramirez had acknowledged to the police that he had been a witness to the shooting, he later changed his story to say that he was away getting a beer when the shots were fired. Saez told one officer that he heard shots and then saw defendant pointing a shotgun, and told another officer that he had observed the shooting. And defense counsel "believe[d]" that Flores would deny the statement he had made to the police that he saw defendant pull a shotgun from his waistband. Defendant claimed that these inconsistencies demonstrated that the officers fabricated evidence by filing false police reports and testifying falsely at the preliminary hearing. The trial court denied defendant's request, writing on the face of the motion that defendant had not set forth a factual scenario to establish good cause for discovery.

"Pursuant to *Brady*, *supra*, 373 U.S. 83, the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request [citation], a general request, or none at all [citation]." (*In re Brown* (1998) 17 Cal.4th 873, 879.) But, as the United States and California Supreme Courts have made abundantly clear, "'[t]here is no general constitutional right to discovery in a criminal case, and *Brady* [] did not create

one . . . .'" (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1135, quoting *Weatherford v. Bursey* (1977) 429 U.S. 545, 559 [97 S.Ct. 837, 845–846].)

With respect to California police personnel and administrative files, "[i]n 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as '*Pitchess* motions' (after [the court's] decision in *Pitchess* v. *Superior Court*[, *supra*,] 11 Cal.3d 531 []) through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. The Penal Code provisions define [peace officer] 'personnel records' (Pen. Code, § 832.8) and provide that such records are 'confidential' and subject to discovery only pursuant to the procedures set forth in the Evidence Code. (Pen. Code, § 832.7.) Evidence Code sections 1043 and 1045 set out the procedures for discovery in detail. . . . [S]ection 1043, subdivision (a) requires a written motion and notice to the governmental agency which has custody of the records sought, and subdivision (b) provides that such motion shall include, inter alia, '(2) A description of the type of records or information sought; and [¶] (3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records.'" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81–83, fns. omitted.)

"A showing of 'good cause' requires defendant to demonstrate the relevance of the requested information by providing a 'specific factual scenario' which establishes a 'plausible factual foundation' for the allegations of officer misconduct committed in connection with defendant. [Citations.]" (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020, quoting *City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at pp. 85–86.) "'A motion for discovery of peace officer personnel records is "addressed solely to the sound discretion of the trial court." [Citation.] A review of the lower court's ruling is subject to an abuse of discretion standard.'" (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1145.)

We conclude that mere inconsistent statements by witnesses about having seen a shooting (which the record indicates had gang implications), none of which exonerate defendant, do not provide a specific factual scenario establishing a plausible factual foundation for allegations of officer misconduct. Accordingly, we find no abuse of discretion in the trial court's conclusion that defendant had not shown good cause for discovery in this case of officers' personnel files.

2. Instruction on Adoptive Admissions

An exception to the hearsay rule exists for adoptive admissions. (Evid. Code, § 1221.) Explaining the proper use of evidence of such admissions in a criminal prosecution, CALJIC No. 2.71.5 instructs that a defendant's silence in the face of an accusation may be considered as indicating that the accusation is true. And as explained in a Use Note to the instruction, it is not to be given when the failure to reply is based on the constitutional right to remain silent.

At a conference regarding jury instructions, the court noted that defendant had objected to CALJIC No. 2.71.5. The court explained that it would give the instruction based on the Saez's statement to Ramirez that defendant had shot at Flores, but that the instruction would be improper with respect to Ramirez's similar statement to the police because defendant had the right to remain silent once the police arrived. During the prosecutor's closing argument, reference was made to Saez's statement to Ramirez that defendant had shot at Flores and to defendant's lack of response to that accusation. In defendant's closing, it was urged that defendant's failure to respond to Saez's statement, coming during the course of a heated altercation, was without meaning. The instruction was thereafter read to the jury.[2]

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[2] As given to defendant's jury, CALJIC No. 2.71.5 provides: "If you should find from the evidence that there was an occasion when the defendant, one, under circumstances which reasonably afforded him an opportunity to reply, two, failed to make a denial in the face of an accusation expressed directly to him or in his presence charging him with a crime for which the defendant is now on trial or tending to connect

(footnote continued on next page)

Defendant contends the instruction was improper because there was no evidence that he could hear the statement made by Saez or that he failed to respond to it. Defendant lodges the same complaint with respect to the statement made by Ramirez. (Defendant does not argue that the trial court improperly failed to limit the instruction to the statement made by Saez or that either *Miranda v. Arizona* (1966) 384 U.S. 436 or *Doyle v. Ohio* (1976) 426 U.S. 610 is implicated by Ramirez's statement.) But as explained in CALJIC No. 2.71.5, an accusatory statement needs only to be made "under circumstances which fairly afford [the accused] an opportunity to hear, understand, and to reply." (*People v. Preston* (1973) 9 Cal.3d 308, 313–314.) Saez's statement was made while he and defendant were close enough to be engaged in mutual combat. And defendant was only five feet away from Ramirez when Ramirez told officers that defendant had shot Flores. The record is devoid of any indication that defendant responded to either of these accusatory statements. (Cf. *People v. Lebell* (1979) 89 Cal.App.3d 772, 779–780 [that witness could hear the defendant's voice in the background of a telephone conversation with person making accusatory statement held inadequate to establish that the defendant heard what was being said by accuser or had an opportunity to respond].) Accordingly, defendant's contention must be rejected.

3. Instruction to View Oral Admissions with Caution

Defendant contends that the trial court prejudicially erred in failing to fulfill its sua sponte duty to instruct pursuant to CALJIC No. 2.71 that "[e]vidence of an oral

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him with its commission, and, three, that he heard the accusation and understood its nature, then the circumstance of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true. [¶] Evidence of an accusatory statement is not received for the purpose of proving its truth but only as it supplies meaning to the silence and conduct of the accused in the face of it. Unless you find that the defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement."

admission of a defendant not made in court should be viewed with caution." He bases his contention on a reading of *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268, which he asserts stands for the proposition that "whenever the jury is instructed with CALJIC 2.71.5, it must also be instructed with CALJIC 2.71."

We do not read *Pensinger* so broadly. In the section of the opinion on which defendant relies, the *Pensinger* court discusses separate instances of oral admissions and adoptive admissions, and the failure to instruct on either. (52 Cal.3d at pp. 1268–1269.) But *Pensinger* does not hold that CALJIC No. 2.71 must be given whenever the jury is instructed with CALJIC No. 2.71.5. Indeed, where, as here, the only admissions exist by virtue of the defendant's silence, there is an inherent illogic to cautioning in the language of CALJIC No. 2.71 about use of admissions that are oral. *Pensinger* also teaches that "courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately." (52 Cal.3d at p. 1268.) Applying this rule to the adoptive admissions here, there is no indication in the instant record of any question or conflict in the evidence about the words used in the accusations. Accordingly, defendant's contention must be rejected.

4. Penal Code Section 654

For the crime of being a felon in possession a firearm, defendant received a prison sentence that was imposed concurrently with a sentence imposed for assault. He contends that the trial court erred in failing to stay imposition of that sentence pursuant to Penal Code section 654. We disagree.

The applicability of Penal Code section 654 presents a question of fact, for which we employ the substantial evidence standard of review. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) Defendant asserts the facts in this case "only supports [his] possession of a firearm simultaneous with the commission of the other crimes for which he was found guilty." Not so. Evidence that defendant withdrew a shotgun from his waistband during the altercation with his victims supports the inference that he had the shotgun before he

entered the apartment complex. Penal Code "section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*People v. Jones, supra,* 103 Cal.App.4th at p. 1145.) Accordingly, defendant's sentence did not violate Penal Code section 654.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.